88-762

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

O. GEORGE SPECHT, JR., and JUNE B. SPECHT,
Petitioners,

v.

ROGER JENSEN, DOUG MARTIN, and DON OWENS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November 1, 1988

QUESTIONS PRESENTED

1. Whether an expert opinion is objectionable on the ground that it articulates legal criteria and terminology.

2. Whether the Tenth Circuit Court of Appeals erred in its determination that the use of a hypothetical is an improper basis for an expert's resolution of factual issues.

3. Whether the admission of expert testimony which synthesizes legal criteria is manifestly erroneous or *per se* prejudicial error.

4. Whether the Tenth Circuit Court of Appeals improperly considered testimony elicited on cross-examination in its determination of the propriety and prejudice of the expert's testimony.

5. Whether the issue of nonconsensual search is an issue of law or an issue of fact.

6. Whether Respondents are estopped from asserting an objection to the expert's testimony on the issue of nonconsensual searches by their refusal to allow the Trial Court to rule on this issue as a matter of law.

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LIST OF PARTIES

The parties to the proceedings below were the Petitioners, O. George Specht, Jr., and June B. Specht, and the Respondents, Roger Jensen, Doug Martin, and Don Owens. Pat Tellier, Ken Jacobs, and the City of Steamboat Springs were Defendents in the original trial court action but did not participate in the appeal to the Tenth Circuit and, therefore, are not named as parties herein.

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IN THE

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October Term, 1988

O. GEORGE SPECHT, JR., and JUNE B. SPECHT,
Petitioners,

v.

ROGER JENSEN, DOUG MARTIN, and DON OWENS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, O. George Specht, Jr., and June B. Specht, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on August 3, 1988, after a rehearing *en banc*.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 832 F.2d 1516 (10th Cir. 1987) and is reprinted in Appendix A hereto.

The opinion of the Court of Appeals for the Tenth Circuit on hearing *en banc* is reported at 853 F.2d 805 (10th Cir. 1988) and is reprinted in Appendix B hereto.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983, the Petitioners brought this suit in the United States District Court for the District of Colorado. On October 15, 1984, after a

favorable jury verdict, the District Court entered judgment in favor of Petitioners.

On Respondents' appeal, on November 10, 1987, the Tenth Circuit issued an opinion *affirming* the District Court. Respondents then sought a petition for rehearing *en banc.*

On February 4, 1988, Respondents' Petition for rehearing *en banc* was granted, and on August 3, 1988, the *en banc* panel reversed itself without benefit of new evidence and concluded that certain testimony was beyond the scope of Fed. R. Evid. 702 and 704 and thus inadmissible, and remanded the matter to the original panel for further consideration.

The jurisdiction of this court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The Federal Rules of Evidence

Fed. R. Evid. 704. Testimony by Experts:

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

STATEMENT OF THE CASE

George and June Specht, husband and wife, brought an action against Roger Jensen, Don Owens, and Doug Martin,

three members of the Steamboat Springs, Colorado Police Department (as well as others not presently before the court), asserting claims under 42 U.S.C. §1983 and Colorado law arising from an unlawful search of the Specht home and George Specht's office. The jury, subsequent to a five-day trial on the merits, found in favor of both Mr. and Mrs. Specht.

At the trial of this matter, Plaintiffs proposed to ask an expert witness, Mr. Daniel Sears, whether in his expert opinion the home and the office of the Spechts were subjected to searches, and if so, whether Plaintiffs had consented to the searches.[1] Defendants objected, contending that these were legal issues and that the expert would intrude upon the province of the Court by giving his opinion. Although the Court offered to instruct the jury on the legality of the searches as a matter of law, Defendants argued that the questions of search and consent were proper issues for the jury. The Trial Court ruled that if the issues were a matter for the jury to decide, the expert could testify on those issues within the parameters of the Court's instructions. The Court articulated the pertinent instructions to be given to the jury. The expert then testified, in response to questions based upon a hypothetical adopting evidence favorable to the Plaintiffs, that searches had occurred and that in his opinion, the searches had not been consensual. (The entire testimony of the expert on direct examination is set forth in Appendix C.)

Additional testimony was elicited from the expert as a result of defense counsel's cross-examination and re-cross. Defense counsel expanded the scope of the expert witness's testimony, asking numerous questions regarding constitutional issues, as well as the elements constituting a violation of §1983. In the Tenth Circuit's opinion reversing itself, the majority of the

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[1] It is important to note that the expert's qualifications were fully established and were not challenged at the trial or subsequent appeal.

testimony found to be objectionable is the testimony elicited by the Defendants, who now assert error.

After receiving carefully articulated instructions from the Court, including a limiting instruction on the proper weight to be given expert testimony, the jury was required to deliberate on essentially four claims: (1) violations of §1983 based on an allegedly unreasonable search of the Spechts' house and business; (2) false imprisonment; (3) outrageous conduct; and (4) exemplary damages. During his direct testimony the expert did not testify with respect to the issues of false imprisonment, outrageous conduct or exemplary damages, nor did he testify whether a violation of §1983 had occurred. The expert did not testify on direct examination that the Plaintiffs had been deprived of a constitutional right; nor did he testify that the Defendants acted under color of state law, ordinance or regulations; nor did he testify that Defendants' acts were the proximate cause of any damages sustained by the plaintiffs. The expert's direct testimony focused on the issues of search and consent and did not encompass all of the elements necessary to prove §1983 violations.

On appeal, the Tenth Circuit *affirmed* the Trial Court's evidentiary rulings, citing the deference traditionally given the Trial Court and concluding that any error which may have occurred was harmless inasmuch as the expert's statements referencing the law did not differ from or conflict with the Court's instructions. The Tenth Circuit also recognized the importance and curative effect of the limiting instruction given by the Trial Court regarding the proper weight to be afforded expert testimony.

After a rehearing *en banc*, the Tenth Circuit inexplicably reversed itself and concluded that the expert's testimony was now inadmissible for the following facially erroneous and conflicting reasons:

1. Testimony which articulates and applies the relevant law circumvents the jury's decision-making function by telling it how to decide the case;

2. The expert was improperly allowed to instruct the jury on how it should decide the case;

3. The admission of the expert's testimony was not harmless error;

4. The expert was allowed to adjudicate the law for the benefit of the jury;

5. Notwithstanding disclaimers by the witness that the Court's instructions would govern, as well as the Court's instruction itself, the jury's deliberation was unduly prejudiced by the expert's testimony;

6. The expert was allowed to testify on an ultimate issue of law, creating a potential for confusion should the expert's opinion differ from the instructions given by the Court;

7. An expert may refer to the law in expressing an opinion in some instances, without the reference rendering the testimony inadmissible. "Indeed, a witness may properly be called upon to aid the jury in understanding the facts and evidence even though reference to those facts is couched in legal terms." 853 F.2d 805, 809;

8. Because the expert based his opinion on hypothetical facts, there could be no issues of fact, but only questions of law.

The Tenth Circuit concluded that the expert testimony was inadmissible as beyond the scope of Fed. R. Evid. 702 and remanded the matter to the original panel for further consideration.

REASONS FOR GRANTING THE WRIT

I. THE OPINION OF THE TENTH CIRCUIT MISCONSTRUES FED. R. EVID. 702 AND 704, EFFECTIVELY DENIES DUE PROCESS AND EQUAL PROTECTION, AND IS IN CONFLICT WITH THE FEDERAL CIRCUITS NECESSITATING GUIDANCE FROM THE U.S. SUPREME COURT.

It is important to note at the outset that the Tenth Circuit's unprecedented decision to reverse itself effectively prohibits Petitioners from proving their case and as such denies them their right to due process and equal protection. In its opinion, the Tenth Circuit refused to direct the Trial Court to rule as a matter of law whether nonconsensual searches had occurred, stating the issue was for the jury, while at the same time concluding that an expert could not testify as to the determination that nonconsensual searches had occurred because this would constitute a legal conclusion.

The opinion of the Tenth Circuit misconstrues Fed. R. Evid. 702 and Fed. R. Evid. 704 and creates a conflict with its own decisions, as well as published decisions of seven other federal circuits. The necessity for guidance from the U.S. Supreme Court is critical because the Federal Rules of Evidence are provided as a cornerstone for fair and equal treatment among the Circuits. A conflict among the Circuits undermines the dictates of due process and equal protection. The expert's conclusion that nonconsensual searches had occurred does not differ from expert testimony determined to be admissible by other federal circuit courts. Indeed, there is no appreciable difference between the expert testimony in the present case and that of the following federal circuit decisions.

First Circuit

In *Wierstak v. Heffernan,* 789 F.2d 968 (1st Cir. 1986), the court allowed a professor to testify as an expert witness regarding the "reasonableness" of a police officer's conduct in an arrestee's §1983 action against a city and police officer.

Third Circuit

In *First National State Bank of New Jersey v. Reliance Electric Co.,* 668 F.2d 725 (3rd Cir. 1981), an expert on the

U.C.C. was allowed to testify whether a bank was entitled to claim the benefits of a holder-in-due course under Article 9 of the U.C.C.

Fourth Circuit

In *Gladhill v. General Motors Corp.*, 743 F.2d 1049 (4th Cir. 1984), the court allowed a police officer to give his expert opinion regarding the legal "cause" of an automobile accident.

Fifth Circuit

In *U.S. v. Fogg*, 652 F.2d 551 (5th Cir. 1981), *reh'g denied* 660 F.2d 499 (5th Cir. 1981), *cert. denied* 456 U.S. 905 (1982), an IRS auditor was allowed to testify as an expert that unreported payments to the taxpayer would be characterized under the Internal Revenue Code as "constructive dividends" in a prosecution for tax evasion. Expert testimony regarding the legal status of monies is admissible when the testimony is not couched as a judicial instruction and the court subsequently instructs the jury regarding the weight to be afforded the testimony.

In *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), the court allowed the expert, a lawyer, to testify concerning the interpretation given certain prospectus boilerplate language used in the securities industry within the context of a securities fraud case.

In *U.S. v. Grote*, 632 F.2d 387 (5th Cir. 1980), an IRS agent was allowed to testify in terms of the "acceptability" of each tax return in the context of a prosecution for income tax evasion.

In *U.S. v. Miller*, 600 F.2d 498 (5th Cir. 1979), a government expert was allowed to testify that certain conduct, standing alone, is not a crime under federal statutes.

In *U.S. v. Masson*, 582 F.2d 961 (5th Cir. 1978), an FBI agent was allowed to testify that the defendent was a "subbookmaker"

in a prosecution for violation of 18 U.S.C. §1955 (illegal gambling).

In *U.S. v. Milton*, 555 F.2d 1198 (5th Cir. 1977), an expert was allowed to interpret transcripts of conversations among the defendants to determine whether defendants were involved in gambling within the ambit of 18 U.S.C. §1955.

In *U.S. v. McCoy*, 539 F.2d 1050 (5th Cir. 1976), an FBI agent was allowed to testify as an expert in analyzing telephone conversations and characterizing certain transactions as "lay-off bets" in a prosecution under 18 U.S.C. §1955.

In *U.S. v. Garber*, 607 F.2d 92 (5th Cir. 1979), the Fifth Circuit held that the trial court erred in refusing to allow experts on income tax law testify regarding whether failure to report funds received for sale of blood plasma constituted income tax evasion under the Internal Revenue Code.

Sixth Circuit

In *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916 (6th Cir. 1984), a professor was qualified as an expert witness and allowed to testify whether age discrimination had occurred.

Seventh Circuit

In *Webb v. City of Chester, Ill.*, 813 F.2d 824 (7th Cir. 1987), the court allowed an assistant professor in the law enforcement department of Western Illinois University to testify as to the appropriateness of plaintiff's actions in the context of a discrimination lawsuit.

Eighth Circuit

In *U.S. v. Bednar*, 728 F.2d 1043 (8th Cir. 1984), the court allowed an SEC expert to give his expert opinion whether a specific document was required by a federal statute. The

expert applied the facts in evidence to the law and gave his expert opinion.

In *Wade v. Haynes*, 663 F.2d 778 (8th Cir. 1981), the court ruled that it was proper to allow an expert witness to testify that the defendant's conduct violated a constitutional standard.

In *U.S. v. McCauley*, 601 F.2d 336 (8th Cir. 1979), the court ruled that it was proper to allow an expert witness to testify that the subject weapon was a machine gun required to be registered pursuant to federal statute.

Tenth Circuit

In *Karns v. Emerson Electric Co.*, 817 F.2d 1452 (10th Cir. 1987) the expert was allowed to testify that a product was "unreasonably dangerous beyond the expectation of the average user" and that the defendant "acted recklessly" in producing and distributing it. *Id.* at 1459. The Tenth Circuit concluded that the legal terms used were not so complex or shaded with subtle meaning as to be beyond the understanding of the average person.

In *U.S. v. Buchanan*, 787 F.2d 477 (10th Cir. 1986), the Court allowed the expert testimony of an officer of the Bureau of Alcohol, Tobacco and Firearms as to the legal definition of a "firearm."

26 U.S.C. §§586(1)(d) & (f) (1982) prohibits the manufacture or possession of an unregistered "firearm." The Tenth Circuit concluded that the Trial Court acted properly in admitting expert testimony on the issue of whether the nature of a particular device was such that it must be registered pursuant to statute.

In allowing the expert to testify that the device was a "firearm" pursuant to 26 U.S.C. §§586(1)(d) & (f), the Tenth Circuit ruled that the Trial Court properly instructed the jury on the statutory definition of "firearms" and the weight to be

afforded such expert testimony. The court concluded that no error occurred in the admission of the expert's legal testimony.

In *Frase v. Henry,* 444 F.2d 1228 (10th Cir. 1971), the Court allowed the testimony of a patrolman who, in response to the question of plaintiff's counsel, "Who do you find at fault in this accident?" replied that from his investigation, he reasoned that the defendant's car failed to yield the right-of-way. The Court concluded that the answer was admissible as an aid to the jury because the expert's testimony synthesized certain facts which the jurors could not have synthesized for themselves. The expert's synthesis of facts, together with the trial judge's cautionary instruction, convinced the Tenth Circuit that the jury was not prevailed upon to abdicate its function in reaching an independent judgment on the ultimate issue of negligence and contributory negligence. "Indeed, the jury was left free to knowledgeably weigh the evidence, credit the witnesses in its wisdom, and finally arrive at its own verdict." *Id.* at 1231.

Eleventh Circuit

In *U.S. v. Gold,* 743 F.2d 800 (11th Cir. 1984), a medicare fraud case, experts were allowed to testify whether certain claims were allowable under the provisions of medicare.

II. THE TENTH CIRCUIT HAS CLOUDED THE PARAMETERS OF ALLOWABLE EXPERT TESTIMONY, HAS REINTRODUCED ARGUMENT OVER THE MEANING OF ULTIMATE ISSUES OF FACT, AND THE DISTINCTIONS BETWEEN FACT AND LAW WHICH THE FEDERAL RULES OF EVIDENCE WERE MEANT TO ELIMINATE.

The questions raised by this Writ are of immediate importance beyond the particular facts and parties to this case.

The Tenth Circuit has clouded the parameters of allowable expert testimony contrary to the specific dictates of Fed. R.

Evid. 702 and Fed. R. Evid. 704. No meaningful standard by which to distinguish proper expert testimony has been articulated in the Tenth Circuit's opinion. The Tenth Circuit does not exclude all expert testimony regarding legal issues, but warns that the expert must not articulate the underlying legal criteria. This holding is contrary to Fed. R. Evid. 704 which strictly forbids opinions based upon inadequately explored legal criteria. *See,* Advisory Committee Notes to Fed. R. Evid. 704. Under the Tenth Circuit's latest opinion, if an expert testifies stating the standard upon which his opinion is based, he usurps the province of the court, or the jury, or both.

The Tenth Circuit's inexplicable decision to reverse itself places into conflict important issues regarding the Federal Rules of Evidence pertaining to expert testimony and *affects every federal court case* in which expert witness testimony is adduced. The U.S. Supreme Court has not yet spoken to the lower courts on this issue, and the guidance of the Supreme Court is clearly needed to resolve this conflict and clarify the appropriate parameters of expert testimony under the Federal Rules of Evidence.

It is the expert's opinion, if relied upon, which guides the jury on a particular issue. Expert opinions are excluded when couched in the form of a pure legal conclusion, not because they usurp the province of the jury, but because they do not provide the jury with the information needed to make an independent assessment of the issue. Thus, an opinion couched in the form of inadequately explored legal criteria is not helpful, and thus inadmissible, because it uses terminology which often is not reasonably clear to laymen. In its opinion dated August 3, 1988, the Tenth Circuit concluded that an expert's testimony is proper under Fed. R. Evid. 702 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function. The Tenth Circuit has now construed the rules of evidence to allow an expert witness to testify as to his conclusion so long as he

does not inform the jury of the rationale and factual synthesis leading to that conclusion. The Tenth Circuit's reversal of itself generally paves the way for irreconcilable future argument in all cases over the distinction between issues of fact and issues of law.

The Tenth Circuit's reversal of itself specifically affects Petitioners because they are now prevented from rebutting testimony elicited by Respondents on the issue of nonconsensual searches. Respondents elicited testimony from a police officer that no search had occurred. Without the assistance of an expert trained in the area of search warrants and proper procedure, Petitioners will be unable to rebut the testimony of the Respondent's police officer and are effectively denied their rights to due process and equal protection.

III. THE OPINION OF THE TENTH CIRCUIT PROHIBITS THE USE OF A HYPOTHETICAL AS THE BASIS OF AN EXPERT OPINION AND MISCONSTRUES THE STANDARD FOR REVIEW IN DIRECT CONFLICT WITH THE WEIGHT OF AUTHORITY

The opinion of the Tenth Circuit misconstrues the use of the hypothetical as the basis of expert opinion. The Court erroneously concluded that:

> [B]ecause the testimony was to be based upon hypothetical questions which assumed the existence of the essential facts, we believe there could be no 'area of fact' involved. Thus, contrary to the Plaintiffs' present assertions, counsel's representation clearly indicated the expert's testimony would cover only questions of law.

853 F.2d 805, 806 n.3

Because an expert may only in rare instances have first-hand knowledge of the facts at issue, the use of hypothetical questions provides the expert with a factual framework for his opinion, while at the same time allowing the jury the

opportunity to agree or disagree with the facts as stated in the hypothetical, as well as the opportunity to benefit from the expert's synthesis of the facts. The Tenth Circuit has now effectively prohibited the use of a hypothetical as the basis for an expert opinion by concluding that opinions based upon assumed facts can only be improper conclusions of law.

The standard for review of the admission of expert testimony is "clear abuse of discretion," *and,* if error was committed, the error must adversely affect substantial rights of the Appellants. *See, e.g., Salem v. U.S. Lines Co.,* 370 U.S. 31 (1962); *Karns v. Emerson Elec. Co.,* 817 F.2d 1452 (10th Cir. 1987). The Tenth Circuit has failed to set forth any basis for a finding of a clear abuse of discretion and has *inexplicably pointed to testimony elicited by counsel for Respondents as the basis for its finding that any error committed in the admission of testimony was not harmless.* The burden of demonstrating that substantial rights were affected by the admission or exclusion of evidence rests with the party asserting error. *K-B Trucking Co. v. Riss Int'l. Corp.,* 763 F.2d 1148 (10th Cir. 1985). The Tenth Circuit assumed the jury disregarded the Trial Court's limiting instruction regarding the proper weight to be given expert testimony, in direct conflict with the weight of authority that overwhelmingly concludes *a limiting instruction precludes a finding of prejudice. See, e.g., Karns v. Emerson Electric Co., supra; U.S. v. Gold, supra; Davis v. Combustion Engineering, Inc., supra; 3 Weinstein's Evidence* ¶04[02] at 704-15 to -16; *McCormick on Evidence* §12 at 31.

CONCLUSION

The Notes of the Advisory Committee to Fed. R. Evid. 704 illustrate and underscore Petitoner's position that it is *"adequately explored legal criteria"* that renders an expert's testimony *proper.* The key is helpfulness. As set forth in the Notes of the Advisory Committee to Fed. R. Evid. 704, the question "Did T have capacity to make a will?" would be excluded, while the question "Did T have sufficient mental capacity to know the nature and extent of his property and the

natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed. The distinction is a technical but important one. A yes or no answer to the first question merely tells the jury which result to reach, but does not provide any rationale or synthesis of criteria which would be helpful to the jury, as does the second question. Following the same rationale, the following would be proper: "Did T have capacity to make a will?" Answer: "Yes, based upon my understanding that T had sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution." The second answer is proper, even though it reaches the same "yes" answer because it sets forth the rationale and the criteria utilized in order to form that opinion. This is precisely what the expert did in this case. It is the expert's guidance and explanation of his rationale and the criteria by which he synthesized the facts, that make the expert's opinion helpful to the jury. The Tenth Circuit fails to recognize this distinction and reintroduces argument over the meaning of ultimate fact, and over the distinctions between fact and law which the Federal Rules of Evidence were meant to eliminate. The Tenth Circuit creates conflict among the Circuits, ignores the weight of authority, and denies Petitioners' guarantees of due process and equal protection. For these reasons, this Petition for Writ of Certiorari should be granted.

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APPENDIX "A"

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

O. GEORGE SPECHT, JR. and JUNE B. SPECHT,	)	
Plaintiffs-Appellees,	)	
v.	)	No. 85-1457
ROGER JENSEN, DOUG MARTIN, and DON OWENS,	)	
Defendants-Appellants,	)	
PAT TELLIER and KEN JACOBS,	)	
Defendants.	)	
O. GEORGE SPECHT, JR. and JUNE B. SPECHT,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 85-1533
ROGER JENSEN, PAT TELLIER, DOUG MARTIN, DON OWENS and KEN JACOBS,	)	
Defendants-Appellees	)	

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 82-Z-809)

Theodore S. Halaby and Robert M. Liechty, of Halaby & McCrea, Denver, Colorado, for Defendants Jensen, Martin and Owens. Arthur H. Bosworth, II (Michael J. Peterson with him on the brief), of Bosworth & Slivka, Denver, Colorado for Plaintiffs.

Before McKAY, SETH, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

George and June Specht, husband and wife, brought this action against Roger Jensen, Dan Owens, and Doug Martin, three members of the Steamboat Springs, Colorado, Police Department.[1] The Spechts asserted claims under 42 U.S.C. § 1983 (1982) and Colorado law arising from the alleged unlawful search of the Specht home and George Specht's office. A jury found in favor of the Spechts, awarding Mr. Specht $151,250 in compensatory damages against Jensen, Owens, and Martin, and awarding Mrs. Specht $76,250 in compensatory damages against Jensen and Owens and $7,500 in punitive damages against Owens.[2] Defendants appeal, asserting that 1) the district court erred in denying their various

[1] The Spechts originally included as defendants various other public officials and private parties. The disposition of the claims against these defendants is not at issue in this appeal.

[2] June Specht also asserted a state tort claim for false imprisonment against two defendants. The jury decided this claim against her.

motions for judgment notwithstanding the verdict; 2) the trial court committed reversible error in its evidentiary rulings; and 3) the trial court erred in denying their motions for new trial or a remittitur because the jury verdict is excessive. We affirm[3].

I.

JUDGMENT NOTWITHSTANDING THE VERDICT

All three defendants moved for j.n.o.v., contending they were entitled to judgment as a matter of law on the state tort claims and the asserted constitutional violations, as well as on the issues of qualified immunity and punitive damages. Upon review of the grant or denial of a motion for j.n.o.v., we must view the evidence and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Western Plains Service Corp. v. Ponderosa Development Corp.*, 769 F.2d 654, 656 (10th Cir. 1985). In so doing, we may not weigh the evidence, pass on the credibility of witnesses, or substitute our judgment for that of the jury. *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 613 (10th Cir. 1984). Accordingly, we must view the record in the light most favorable to the Spechts in setting out the facts presented at trial and in assessing individually defendants' motions for j.n.o.v.

The incidents giving rise to this lawsuit involve the attempts of Ken Jacobs,[4] a private citizen, to repossess a computer that

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[3] Although the Spechts brought a cross-appeal, they asserted at oral argument that they would withdraw it if the judgment were affirmed. In view of our dispositon of this appeal, we deem the cross-appeal abandoned.

[4] Jacobs was a defendant at trial and was found liable to the Spechts for violations of 42 U.S.C. § 1983 and state tort law. The jury awarded both Spechts actual damages against Jacobs and, in addition, awarded Mrs. Specht exemplary damages. Jacobs did not appeal.

had previously been repossessed from Jacobs by the Spechts' son Timothy. Jacobs had obtained a state court order of possession and writ of assistance that directed any sheriff to assist Jacobs in obtaining the computer.

The Spechts, who are in their sixties, live in Steamboat Springs. Although Timothy, who was thirty-seven, had not lived with his parents for many years, he had been in business with his father for a time and Jacobs thought the computer might be located at the Spechts' home. Consequently, Jacobs traveled to Steamboat Springs with two friends, Peter Corr and Ken Long. Long, who owned a restaurant, had previously held positions as a law enforcement official. Corr was a Denver police officer on medical leave.

Before the trip, Long called defendant Jensen, a supervisor with the Steamboat Springs police department, whom Long had known for several years. Long told Jensen that a friend had a court order and might need some help executing it. Jacobs, Corr, and Long arrived at the Steamboat Springs police station in the early afternoon of Wednesday, February 24, 1982. Jensen, who was just going off duty, told his replacement, Pat Tellier, "to take care of" the three men. Rec., vol. IV, at 70. Jacobs learned the location of the Specht residence at the police station, and he drove there that afternoon with Corr and Long. They were accompanied by defendant Owens, a Steamboat Springs police officer, at Tellier's direction. No one was home and they returned to the police station.

Jacobs then obtained the location of George Specht's business office. He, Corr, and Long drove to the office, found no one there, and went back to the police station again. Sometime early that evening, Tellier said he knew the person who owned the building in which Mr. Specht's office was located. Tellier called the daughter of the owner, Dorinda Wheeler, and told her about the court order. She called her brother, Steve Valdeck. Ms. Wheeler and Mr. Valdeck went to the building that evening and met Corr, Long, and Jacobs,

who were accompanied by defendant Martin, another Steamboat Springs police officer, at Tellier's instruction. Martin asked Valdeck if he had brought the key. Valdeck asked if he could see the search warrant and Jacobs handed him the order of possession. Valdeck unlocked the building, and they all entered it and went into the reception area that served both George Specht's office and the other building occupant. At least some of the group then went into Mr. Specht's office, the doors of which were closed but not locked, turned on the lights, and looked around. Jacobs used a flashlight to look into the corners. Finding nothing, the men returned to the reception area, looked into a storage closet used by both building occupants, and left.

Early the next morning, Long called the police station and requested a police car to accompany them to the Specht residence. Long, Corr, and Jacobs went to the home and were met there at approximately 7:45 a.m. by defendant Owens and an officer-in-training, Gomez. Before approaching the front door, Owens asked Jacobs what powers the writ provided. Jacobs told him that it gave the same powers as a search warrant.

Owens then knocked on the door and June Specht answered. Owens asked for Mr. Specht, who was out of town on business. Mrs. Specht told Owens that her husband was not home and asked if she could help him. She asked him in, and the other four men came in uninvited. Jacobs stated that he had a search warrant to seize a stolen computer. Owens and Jacobs both told Mrs. Specht that if she obstructed Jacobs or did not cooperate, Owens would arrest her and take her to jail. She and Jacobs entered into a heated exchange while the men began milling around the kitchen, and living and dining areas. Jacobs and Owens told her several times to cooperate or she would go to jail. When Mrs. Specht stated that she wanted to call her lawyer, Owens told her she had no right to do so unless Jacobs said she could. Jacobs then told her she could

not. She finally gave them her son's work phone number and the men left. They had been at the home approximately thirty to forty minutes.

A. Unconstitutionality of the Searches

The Spechts sought damages under section 1983, asserting that defendants' conduct violated their Fourth Amendment right to be free from unreasonable searches. Section 1983 applies to persons who both deprive others of a right secured by the Constitution or laws of the United States, and act under color of state law. *See Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1428 (10th Cir. 1984). Owens and Martin contend that the Spechts failed to present sufficient evidence that a search of the office or the home had occured. Alternatively, they contend that they did not violate the Specht's constitutional rights because they were at most negligent in relying on the repossession order to conduct the searches.

1. Existence of the Searches.

The court instructed the jury without objection that "a search is a visual observation which infringes upon a person's reasonable expectations of privacy." Rec., vol X, at 921. George Specht testified that he closed his office doors and drapes when he was not there, and that he kept confidential business information on his desk. Assuming as we must that such assertions are true, Mr. Specht indisputably had a reasonable expectation of privacy in his office against police intrusions. *O'Connor v. Oretga,* 107 S. Ct. 1492, 1498 (1987); *see Mancusi v. DeForte,* 392 U.S. 364, 369 (1968). The evidence of the warrantless entry into his office and the activity that occurred there was sufficient to send to the jury the issue of whether this entry and activity constituted a search. Likewise the activity that took place in the Specht home clearly raised a fact issue regarding a visual inspection of that which the

Spechts could reasonably have expected to remain private and which they did not voluntarily expose to the public view.[5]

2. Mental State of Officials.

While the instant appeal was pending, the United States Supreme Court held that an injury arising from a state agent's negligent actions does not deprive an individual of life, liberty, or property under the Fourteenth Amendment due-process clause. *Daniels v. Williams,* 106 S. Ct. 662, 665 (1986) ("mere lack of due care by a state official [will not] 'deprive' an individual of life, liberty or property under the Fourteenth Amendment"); *Davidson v. Cannon,* 106 S. Ct. 668, 670 (1986) (same). In these cases, the Court adopted the position recognized by this circuit at least since *Hewitt v. City of Truth or Consequences,* 758 F.2d 1375, 1379-80 (10th Cir. 1985), that a state official's negligence does not invariably rise to the level of an abuse of power necessary to give rise to a due process violation. Defendants argue here that their negligence in relying on the repossession order cannot violate the Spechts' constitutional rights.

[5] The jury rejected defendants' argument that Mrs. Specht had consented to the search, and defendants do not raise the issue of consent on appeal.

Daniels and *Davidson* involved procedural due process.[6] The plaintiffs contended that negligent torts by state officials constituted a denial of their liberty without due process of law. The Supreme Court disagreed, holding that the plaintiffs' injuries were not compensable under section 1983 because negligently leaving a pillow on the stairs of a prison, as the guard did in *Daniels*, or failing to respond quickly to a prisoner's written request, as the official did in

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[6] The phrase "procedural due process" is a term of art used by the federal courts to distinguish among different sorts of individual rights and liberties that the Fourteenth Amendment due process clause guarantees against state action. *See Daniels v. Williams*, 106 S. Ct. 677, 678 (1986) (Stevens, Jr., concurring in judgment). A "procedural due process" violation refers to an instance where the state violates the Constitution not in the action that it takes, but in its failure to provide sufficient process to guarantee that the individual is treated fairly. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67 (1972) (meaningful notice and hearing must preceed state seizure of property); *In re Winship*, 397 U.S. 358 (1970) (proof beyond a reasonable doubt required to find an individual guilty of a crime). Conversely a "substantive due process" violation occurs where the state action itself is unconstitutional regardless of the process extended. *Youngberg v. Romeo*, 457 U.S. 307, 315, 319 (1982) (mental patient admitted under proper procedures retains substantive liberty interests in safety and freedom from bodily restraint protected by Fourteenth Amendment); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) ("sanctity of the family" is a right protected by substantive due process component of the Fourteenth Amendment); *see Daniels*, 106 S. Ct. at 665. A third sort of constitutional violation involves those enumerated rights found in the first eight amendments that the Fourteenth Amendment due process clause applies to the state. *See, e.g., Douglas v. City of Jeannette*, 319 U.S. 157 (1943) (First Amendment rights); *Wolf v. Colorado*, 338 U.S. 25 (1949) (Fourth Amendment rights); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment compelled self-incrimination clause); *Benton v. Maryland*, 395 U.S. 784 (1969) (Fifth Amendment double jeopardy clause); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment right to a jury trial); *Robinson v. California* 370 U.S. 660 (1962) (Eighth Amendment cruel and unusual punishment clause).

Davidson, does not constitute the deprivation of a liberty interest protected by procedural due process.

This case involves a section 1983 claim arising out of a search of plaintiffs' home and office, not a procedural due process claim. In *Daniels,* the Court recognized that in any given section 1983 action, the court must determine the state of mind, if any, necessary to violate the constitutional provision at issue. *See* 106 S. Ct. at 664; *McKay v. Hammock,* 730 F.2d 1367, 1373 (10th Cir. 1984) (en banc). We must therefore determine what mental state, if any, a state official must have in order to conduct an unconstitutional search.

The right to be free from unreasonable searches and seizures originates in the Fourth Amendment and is applied to the states through the Fourteenth Amendment due process clause. *Wolf v. Colorado,* 338 U.S. 25 (1949) (Fourteenth Amendment incorporates Fourth Amendment rights); *Mapp v. Ohio,* 367 U.S. 643 (1961) (exclusionary rule applies to state violations of Fourth Amendment rights). Specifically enumerated constitutional rights found in the first eight amendments are applied to the states in exactly the same fashion that the right is guaranteed against federal intrusion. *Benton v. Maryland,* 395 U.S. 784, 795 (1969); *see Ker v. California,* 374 U.S. 23 (1963) (although disagreeing over the existence of probable cause, eight of nine justices agreed that same Fourth Amendment inquiry applies to state and federal action). "The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights. . . . '" *Mallory v. Hogan,* 378 U.S. 1, 10-11 (1964) (privilege against self-incrimination applies to states in same manner as to federal government).

The Supreme Court has justified this form of incorporation by recognizing that both state and federal criminal justice systems have developed from the same common-law heritage and are in virtually every relevant sense identical systems. *Duncan v. Louisiana,* 391 U.S. 145, 148-49 & n. 14 (1968).

Although the particular genesis of a guarantee of individual liberty does not necessarily dictate the only imaginable way to protect a particular right, the similarity in origin and current practice of the criminal justice systems throughout the country leads to the conclusion that what is fundamental to fairness in the federal system "is fundamental in the context of the criminal processes maintained by the American States." *Id.* at n. 14. In this case, therefore, we must determine what mental state is necessary to violate an individual's Fourth Amendment rights.

The contours of the search and seizure and warrant clauses are not nearly so vague as those encompassed by the due process clause. *Cf. Hewitt,* 758 F.2d at 1379. The Constitution explicitly prohibits all unreasonable searches and mandates that no warrants shall issue except upon probable cause.[7] As these clauses have been interpreted, a police officer must obtain a search warrant before conducting a search unless an exception to the warrant requirement exists. *Katz v. United States,* 389 U.S. 347, 357 (1967); *see Mincey v. Arizona,* 437 U.S. 385, 390 (1978) (describing warrant requirement as a "cardinal principle" of Fourth Amendment law); *Johnson v. United States,* 333 U.S. 10 (1948) (post-hoc showing that probable cause existed does not justify warrantless search).

The Supreme Court has on numerous occasions delineated the scope of individual Fourth Amendment rights by clarifying the probable cause standard, *e.g., Illinois v. Gates,* 462 U.S. 213 (1983) (refining standard for determining

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[7] "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. amend. IV.

whether probable cause exists to issue a warrant based on informant's tip), and defining exceptions to the warrant requirement, *e.g., United States v. Robinson,* 414 U.S. 218 (1973) (clarifying search incident to arrest exception to warrant requirement). In these cases, the Court has never implied that the existence of a constitutional violation hinges upon the official's mental state. Instead, the Court has balanced "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place,* 462 U.S. 696, 703 (1983); *see Tennessee v. Garner,* 105 S. Ct. 1694, 1699 (1985) (balancing of individual and state interests is key principle of Fourth Amendment jurisprudence); *Michigan v. Summers,* 452 U.S. 692, 700 n. 12 (1982) (same). In sum, a Fourth Amendment violation occurs when police engage in a warrantless search and no exception to the warrant requirement applies, or when police search pursuant to a warrant not based on probable cause. That the police officer acted in an objectively reasonable (i.e., non-negligent) manner is irrelevant to the existence of a constitutional violation. *See, e.g., Anderson v. Creighton,* 107 S. Ct. 3034 (1987); *Malley v. Briggs,* 106 S. Ct. 1092 (1986); *United States v. Leon,* 468 U.S. 897 (1984).

The mental state of an officer who violates the Fourth Amendment becomes relevant only when determining whether a particular remedy will be available. For example, although the officers conducting the search in *Leon* violated the defendant's Fourth Amendment rights, 468 U.S. at 904-05, the exclusionary rule did not apply because the officers acted in an objectively reasonable fashion. Had the police acted unreasonably (i.e., negligently) in relying on the warrant, the exclusionary rule would have prevented the fruits of the search from being introduced into evidence in a criminal prosecution against the individual whose rights were violated. *Id.* at 921 n. 20, 923-24. In a section 1983 action, the existence of qualified immunity for police officers who rely on a warrant is

determined by an identical inquiry into the objective good faith of the officers. *Malley*, 106 S. Ct. at 1098; *cf. Anderson*, 107 S. Ct. at 3039-40 (same rule for warrantless search). In either case, the availability of a remedy (exclusion of evidence or civil damages) involves a totally separate inquiry from that necessary to determine whether a constitutional violation has occurred. *See Leon*, 468 U.S. at 906.[8]

Thus, although good faith may shield individual actors from liability in appropriate cases, *see* Part IC *infra.*, no specific mental state is required to violate the Fourth Amendment. Defendants' argument that no constitutional violation occurred because the officers in this case were merely negligent in relying upon a repossession order to conduct the office and home searches is without merit.

B. Officers' Participation in Searches

Defendants Owen and Martin contend that the evidence of their participation in the searches undertaken by the three private parties is insufficient as a matter of law to impose liability on them under section 1983. We are not persuaded. When a government official affirmatively facilitates or encourages an unreasonable search performed by a private person, a constitutional violation occurs. *See, e.g., Booker v. City of Atlanta*, 776 F.2d 272, 274 (11th Cir. 1985) (police

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[8] In *Leon*, the Court stressed that lower courts may address underlying Fourth Amendment issues before deciding whether the remedy sought is available. *Id.* at 924-25 (alleged Fourth Amendment violations "undoubtedly raise live controversies which Art. III empowers federal courts to adjudicate"). This approach is essential to the continued development and articulation of the liberty protected by the Fourth Amendment. *See id.* at 925 ("If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before" deciding whether a remedy exists.).

presence, even absent active participation, could provide an intimidating "cachet of legality" establishing a constitutional violation); *Harris v. City of Roseburg*, 664 F.2d 1121, 1127 (9th Cir. 1981) (issue whether police officer did more than merely "'stand by in case of trouble'" involves factual determination).

The evidence with respect to both Owens and Martin is sufficient to create a fact issue on whether their conduct was such that the searches at issue occurred under color of state law. Martin drove a police car to the office building upon Tellier's instruction after Tellier had asked Dorinda Wheeler to unlock the building. Martin asked Steve Valdeck if he had brought the key. Valdeck testified that Martin's presence had a great effect on his decision to unlock the building because he felt it gave the men an official reason for being there. This evidence supports the reasonable inference that no search of the office would have occurred absent Martin's activity. The evidence of Martin's role in gaining access to the office by lending the authority of the police to the entry was sufficient to permit the jury to find that he was more than a mere peace-keeping bystander. *See Booker*, 776 F.2d at 274; *Howerton v. Gambica*, 708 F.2d 380, 382-84 (9th Cir. 1983); *Harris*, 664 F.2d at 1127.

The evidence of Owens' activity at the Specht residence is likewise sufficient to allow the jury to find that he actively participated in the search. Owens' threats to take June Specht to jail if she obstructed Jacob's search for the computer and Owens' statement that she could not call her lawyer without Jacobs' consent support a finding that Owens made an important affirmative contribution to the private conduct. *See Booker*, 776 F.2d at 274; *Howerton*, 708 F.2d at 382-84; *Harris*, 664 F.2d at 1127. Thus, the district court properly denied Owens' and Martin's motions for a j.n.o.v. with respect to their participation in the searches.

Jensen argues that he was entitled to a j.n.o.v. because there was insufficient evidence of the required connection between his conduct and the alleged constitutional violations. A supervisor is not liable under section 1983 unless an "affirmative link" exists between the deprivation and either the supervisor's "personal participation, his exercise of control or direction, or his failure to supervise." *McKay*, 730 F.2d at 1374. The court in this case instructed the jury without objection that

> "[a] person subjects another to the deprivation of a constitutional right within the meaning of . . . section 1983 if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes a deprivation of which complaint is made. Personal participation is not necessary. Anyone who causes any citizen to be subjected to a constitutional deprivation is also liable. Requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the unconstitutional injury."

Rec., vol. X, at 920-21.

The record here is sufficient to support the jury finding on Jensen's liability under the applicable law. The Spechts presented evidence that when Long called Jensen before the trip to Steamboat Springs and told Jensen that Jacobs might need assistance in executing an order, Jensen said "[s]ure, come on over, or something to that effect." Rec., vol. IV, at 68. When Long, Jacobs, and Corr arrived at the police station, Jacobs showed Jensen the order and Jensen told Tellier to "take care of" them. *Id.* at 70. In response to Jensen's instruction, Tellier assigned police officers to accompany the men to the Specht office and home. This evidence is sufficient

to raise a fact issue as to either Jensen's personal participation in, or control or direction of, the events culminating in the alleged injuries. *Cf. Miller v. City of Mission*, 705 F.2d 368, 375-76 (10th Cir. 1983) (upholding imposition of liability on council members who participated in wrongful termination decision). Thus, the district court properly denied the motion by Jensen for a j.n.o.v. with respect to his role in providing police participation in the searches.

C. Qualified Immunity

Defendants contend that they were entitled to a j.n.o.v. on their claim for qualified immunity. Government officials performing discretionary functions are entitled to qualified immunity "shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson*, 107 S. Ct. at 3038. This inquiry turns on "the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken . . . ." *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819, 818 (1982)). The Supreme Court has pointed out that whether a search was objectively legally reasonable "will often require examination of the information possessed by the searching officials." *Id.* at 3040. Thus the relevant inquiry "is the objective (albeit fact-specific) question whether a reasonable officer could have believed [defendants'] warrantless search to be lawful, in light of clearly established law and the information in the searching officer's possession." *Id.*

The availability of qualified immunity is ordinarily decided on a motion for summary judgment. However, defendants did not move for summary judgment on that ground. Instead, the jury was instructed that defendants were not liable to plaintiffs if the jury found that "(1) the defendant believed at the time of the the incident that the action he took was lawful; (2) defendant held such a belief in good faith; and (3) it was

reasonable for the defendant to reach the conclusion he did." Rec., vol. X, at 924. This instruction incorporates the element of subjective good faith that the Supreme Court eliminated from the qualified immunity defense in *Harlow v. Fitzgerald,* 457 U.S. 800, 815-19 (1982). Although plaintiffs raised the propriety of the content of the instruction with the district court, defendants stated that they had no objection to the instruction as given.

On appeal, defendants do not assert that the instruction constitutes plain error. Instead they argue that there was no evidence upon which the jury could have found a violation of clearly established rights of which a reasonable officer would have known. We disagree. Even though Jacobs told Owens that the writ of assistance was equivalent to a warrant, the writ on its face was not a search warrant. Moreover, it was directed to any sheriff rather than to a police officer. These undisputed facts undermine defendants' assertion that their conduct in the face of this information was objectively reasonable as a matter of law. The district court properly denied their motions for judgment notwithstanding the verdict.

D. Outrageous Conduct and Punitive Damages

Owens contends that the evidence is insufficient to support the jury verdict finding him liable on June Specht's claims for outrageous conduct under state law and for punitive damages. Colorado recognizes a cause of action for intentional infliction of emotional distress when the plaintiff shows that:

> "(1) the conduct is extreme and outrageous; (2) the conduct is intentional or reckless; (3) the conduct causes emotional distress; and (4) the distress is severe. [Citation omitted]. For the conduct to be considered extreme and outrageous, it must 'go beyond all possible bonds of decency and . . . be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average

member of the community would arouse his resentment against the actor, and lead him to exclaim 'Outrageous!'"

Malandris v. Merrill Lynch, Pierce, Fenner & Smith, 703 F.2d 1152, 1158 (10th Cir. 1981) (en banc) (plurality opinion) (quoting *Rugg v. McCarty,* 173 Colo. 170, 476 P.2d 753, 756 (1970) (citation omitted)), *cert. denied,* 464 U.S. 824 (1983). "Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability." *DeCicco v. Trinidad Area Health Ass'n,* 40 Colo. App. 63, 573 P.2d 559, 562 (1977) (quoting Restatement (Second) of Torts § 46 comment h (1965).

As we have noted above, Owens actively participated in the improper search by five men of the Specht home at an early hour when he knew June Specht was alone in the house. He repeatedly threatened to arrest her and take her to jail, and supported Jacobs' refusal to allow her to call her lawyer. This evidence is sufficient to raise a fact issue on the outrageous nature of Owens' conduct. The evidence is equally sufficient to support the award of punitive damages against Owens for conduct in "wanton and reckless disregard of the rights and feelings of [June Specht]." Rec., vol. ? , at 932.

II.

EVIDENTIARY RULINGS

Defendants argue that the trial court erred in permitting a lay witness and an expert to testify as to the legal definition of a search, thereby usurping the province of the court. Defendants also contend that allowing these witnesses to give their opinions on whether a search took place invaded the province of the jury. These are matters committed to the discretion of the trial court, *Karns v. Emerson Electric Co.,* 817 F.2d 1452, 1459 (10th Cir. 1987), and we are not persuaded that an abuse of discretion occurred.

A lay witness may give an opinion if it is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony on the determination of a fact in issue." Fed. R. Evid. 701. Moreover, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704.

Plaintiffs proposed to ask Long, who had prior experience as a law enforcement officer, whether in his opinion the office building incident constituted a search. Defendants objected on the ground that the question called for a legal conclusion. The court overruled the objection, stating that Long could answer "in his experience how this compared with a search . . . ." Rec., vol. V, at 102. Long was then asked whether, in his opinion, going into the building was a search, and he responded "we entered the building, we did not go in any areas that could not have contained the subject computer, and we didn't go through doors or rummage through the place or anything like that. *But within the confines of the purest definition, simply walking with your eyes open is a search.*" Rec., vol. V, at 103-04 (emphasis added).

Although the italicized sentence, which defendants cite as grounds for reversal, was arguably objectionable as not responsive to the question, defendants did not object or move to strike on that ground. The sentence may also have been objectionable as contrary to the court's instruction that Long "answer according to his experience, not to the legal definition." *Id.* at 103. However, defendants did not object on that ground either. The court subsequently instructed the jurors that they were "to follow the law stated in the instructions of the Court and to apply the rules of law so given to the facts as you find them from the evidence in the case." Rec., vol. X, at 911. Under these circumstances the error, if any, was harmless.

Defendants also contend that the court erroneously permitted opinion testimony from plaintiffs' witness Daniel

Sears, who was qualified as an expert on the constitutional law of search and seizure and on criminal procedure. Plaintiffs proposed to ask Sears whether, in his expert opinion, the home and the office were subjected to searches and if so whether the searches were illegal. Defendants again objected, contending that this was a legal issue and that Sears would therefore intrude upon the province of the court by giving his opinion. Although the court offered to instruct the jury on the legality of the searches as a matter of law, defendants did not accept the offer. The court then ruled that if the legality of the searches was a matter for the jury to decide, Sears could give his opinion on that issue within the perimeters of the court's instructions on the law. Sears then testified, in response to hypothetical questions adopting evidence most favorable to plaintiffs, that searches had occurred and that in his opinion the searches were illegal. On appeal, defendants contend that Sears' testimony usurped the province both of the district court and of the jury.

Experts may give opinions if their specialized knowledge will assist the fact finder to understand the evidence or to determine a fact. Fed. R. Evid. 702. Significantly, as set forth above, an opinion is admissible even though it goes to an ultimate issue to be decided by the fact finder. Thus, to the extent defendants contend that the court erred by allowing Sears to express an opinion on an issue defendants agreed was a jury question, their argument is without merit.

Defendants also assert that reversible error occurred because Sears improperly told the jury what law to apply. We disagree. Although it constitutes error to allow a witness to instruct the jury on the applicable law, *see, e.g., United States v. Zipken,* 729 F.2d 384, 386-87 (6th Cir. 1984); *Mark & Co., Inc. v. The Diners' Club, Inc.,* 550 F.2d 505, 510 (2d Cir. 1977), a review of the entire record demonstrates that no such improper instruction occurred here. Defendants pointed out on cross-examination that Sears' opinions were based on his own view of the law, and that Sears did not know what the court's

instructions on the law would be. Although Sears agreed that his view of the law in the area of search and seizure could very well differ from that of the trial judge, his definition of an illegal search was essentially the same as the one the judge gave to the jury. *Cf. Karns*, 817 F.2d at 1459. Sears further stated that the trial court's "understanding of the law is controlling in this case." Rec., vol. III, at 133. In addition to instructing the jury that it must apply the law as stated in the court's instructions, the court also informed the jury that it could determine what weight, if any, should be given to the expert testimony. Under these circumstances, we are not prepared to say that the jury misunderstood its duty to follow the law given by the court or that it gave improper credence to any legal definitions embodied in Sears' testimony. *See Karns*, 817 F.2d at 1459 (upholding admission of expert testimony on legal issue where "'jury was [not] prevailed upon to abdicate its function or responsiblity for reaching an independent judgment on the ultimate issues . . . .'").

We are not persuaded by defendants' contention that the court committed reversible error by refusing to allow Sears to be cross-examined on his knowledge of specific judicial decisions. The court found that defendants' proposed questioning on particular constitutional cases was irrelevant because it would mean nothing to the jury. "[T]he scope and extent of cross-examination of expert witnesses rests in the sound discretion of the trial court and 'is not subject to exception unless wholly arbitrary, unreasonable and abusive, and the examination need not be extended to permit interrogation about collateral, immaterial or irrelevant matters.'" *United States v. 10.48 Acres of Land*, 621 F.2d 338, 340 (9th Cir. 1980) (quoting *United States v. 25.02 Acres of Land*, 495 F.2d 1398, 1402 (10th Cir. 1974)). Even assuming that such cross-examination was relevant to Sears' credibility as an expert, "it was still within the discretion of the trial court to exclude this evidence if its probative value was substantially outweighed by the risk that its admission would confuse the issues or mislead the jury."

10.48 Acres of Land, 621 F.2d at 340. We agree with the trial court's assessment here that the requested cross-examination would have had no value to the jury. Accordingly, we find no abuse of discretion.

Defendants also object to the court's decision allowing evidence of a statement Jensen made to a process server regarding service in this action. Plaintiffs asked Jensen if he had said "we screwed up and now we're in trouble." Rec., vol. VIII, at 704. Defendants objected that the statement was prejudicial, inflammatory, and not probative. The district court ruled that the alleged statement was relevant as an admission against interest and also was probative on the issue of good faith. Rec. vol. VIII, at 693-95. A trial court has broad discretion in determining whether relevant evidence is admissible under Fed. R. Evid. 403. *See Higgins v. Martin Marietta Corp.*, 752 F.2d 492, 497 (10th Cir. 1985). We are not convinced the court abused its discretion.

When Jensen denied making the statement, plaintiffs called the process server to the stand on rebuttal and he testified that Jensen made the statement to him. Jensen asserts on appeal that this testimony was inadmissible under Fed. R. Evid. 608(b). No objection was made to the testimony at trial, and we will not consider this allegation here. *See* Fed. R. Evid. 103(a)(1); Fed. R. Civ. P. 61.

III.

DAMAGES

Defendants contend that the amount of damages was excessive and that the district court therefore erred in denying their motion for a new trial or, in the alternative, for remittitur. A district court's refusal to grant a new trial motion asserting excessive damages is afforded "considerable deference on appeal." *Karns*, 817 F.2d at 1460; *Blevins v. Cessna Aircraft Co.*, 728 F.2d 1576, 1579 (10th Cir. 1984). Moreover, "absent an award so excessive as to shock the judicial conscience and

to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the damages is considered inviolate." *Malandris*, 703 F.2d at 1168; *see also Karns*, 817 F.2d at 1460; *Aspen Highlands Skiing v. Aspen Skiing Co.*, 738 F.2d 1509, 1526 (10th Cir. 1984), *aff'd*, 105 S. Ct. 2847 (1985); *Blevins*, 728 F.2d at 1579.

Plaintiffs presented evidence through lay and expert testimony of Mrs. Specht's psychological injury. The Spechts also testified to their change in lifestyle and the resulting loss of their enjoyment in life. Mr. Specht testified that prior to the incidents at issue, he had been president of a company and had traveled extensively because he had been completely responsible for the company's sales in the United States and Canada. After the incidents, his wife was afraid to be left alone, so he resigned as president and retained four small accounts as a sales agent for the company.

In view of this largely undisputed evidence of emotional injury and financial loss, we find no ground for disturbing the trial court's refusal to grant a new trial or remittitur. Upon thorough view, the record does not provide an irresistible inference that the verdict amount was the product of passion or prejudice.

AFFIRMED.

APPENDIX "B"

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

O. GEORGE SPECHT, JR. and JUNE B. SPECHT,	)	
Plaintiffs-Appellees,	)	
v.	)	No. 85-1457
ROGER JENSEN, DOUG MARTIN, and DON OWENS,	)	
Defendants-Appellants,	)	
and	)	
PAT TELLIER and KEN JACOBS,	)	
Defendants.	)	
O. GEORGE SPECHT, JR. and JUNE B. SPECHT,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 85-1533
ROGER JENSEN, DOUG MARTIN, DON OWENS, PAT TELLIER, and KEN JACOBS,	)	
Defendants-Appellees	)	

ON REHEARING EN BANC

Appeal from the United States District Court
For the District of Colorado
D.C. No. 82-Z-809

Arthur H. Bosworth, II, (Michael J. Peterson with him on the on the brief) of Bosworth & Slivka, Denver, Colorado, for Plaintiffs-Appellees.

Theodore S. Halaby (Robert Mark Liechty with him on the briefs) of Halaby & McCrea, Denver, Colorado, for Defendant-Appellant Jensen.

Before **HOLLOWAY,** Chief Judge, **McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK,** and **BRORBY,** Circuit Judges.

MOORE, Circuit Judge.

This case is before the court for rehearing *en banc* of one issue; in all other respects the panel opinion[1] stands. The question considered is whether Fed. R. Evid. 702 will permit an attorney, called as an expert witness, to state his views of the law which governs the verdict and opine whether defendants' conduct violated that law. We conclude the testimony was beyond the scope of the rule and thus inadmissible.

[1] *Specht v. Jensen*, 832 F.2d 1516 (10th Cir. 1987).

I.

This case is an action for damages pursuant to 42 U.S.C. § 1983 grounded upon allegedly invalid searches of the plaintiffs' home and office. The underlying facts are set forth in the panel opinion and need not be restated here.[2] What is germane for present consideration is whether defendants' conduct involved a "search" within the meaning of the Fourth Amendment and whether plaintiffs consented to the search were issues to be determined by the jury.

After testimony had been presented by the plaintiffs to establish the underlying facts, plaintiffs' counsel informed the court he wished to call an attorney who, after being given "a hypothetical of the facts that are in evidence in this case," would be asked if he believed that a search took place in the plaintiffs' home and business. Counsel stated that the witness would then be asked "based on the same facts in evidence whether he believed a consent search of either the business or the residence had been taken or undertaken." Finally, counsel proposed to ask the witness:

> [B]ased on his knowledge in these areas what would constitute a proper search, or the proper documents constituting or allowing a search and would expect that he would say as follows: That if there is no search warrant, if there is no consent, if there are no exigent

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[2] *See Specht*, 832 F.2d at 1519-20.

circumstances, that the search is illegal per se. And that would be the extent of his testimony.[3]

Defense counsel objected to the propriety of the testimony, suggesting that the subject was beyond the scope of Rule 702. He argued, "here we have an issue involving whether or not this [testimony] intrudes on the province of this court in terms of the law." Counsel continued:

> [W]hat constitutes [a] reasonable or unreasonable search is a matter of law. How the jury applies that law to these facts is the province of the jury. But the law must be defined by the Court, not by an expert witness. . . . [I]n order for [the expert] to testify, he must first presume what the Court is going to instruct as to the law; and if he doesn't presume what he thinks the Court is going to instruct as to the law, he must . . . define his own definitions of the law; and that's where the intrusion of the court is germane.
>
> . . . .
>
> Now, is [the expert] going to tell the jury what the law is upon which he is going to apply a hypothetical set of

[3] When questioned by the court whether the witness would be testifying on "an area of fact," plaintiffs' counsel did not directly answer but explained the witness would render opinions on whether there had been a search, whether there had been consent to the search, whether the consent was voluntary, and whether there were exigent circumstances to permit a warrantless search. Because the testimony was to be based upon hypothetical questions which assumed the existence of the essential facts, we believe there could be no "area of fact" involved. Thus, contrary to the plaintiffs' present assertions, counsel's representation clearly indicated the expert's testimony would cover only questions of law.

facts, or is this court going to tell the jury what the standard is?

Following those remarks, the court ruled:

> THE COURT: Although the Court doesn't have the precise instruction that it intends to give, the instruction would be along the line that the constitution protects citizens against unreasonable searches; that this means that a search warrant must be obtained from a judicial officer before a search can be made of a home or an office; that there are exceptions to this requirement, one being a search by consent. Where there is consent, the law enforcement officers may reasonably conduct a search to the extent of the consent.

With this ruling, the expert was allowed to testify, and he did so at length. On the basis of hypothetical questions tailored to reflect plaintiffs' view of the evidence, the expert concluded there had been no consent given, and illegal searches had occurred.

II.

A.

We begin our analysis with a careful look at the contents and purpose of Fed. R. Evid. 702. It states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

As noted by the adivisory committee:

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to

> determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

(Citation omitted.) Judge Weinstein expressed a similar point:

> The test expressed in Rule 702—will the expert testimony "assist the trier of fact to understand the evidence or to determine a fact in issue"—emerges as the central concern of Article VII [of the Federal Rules of Evidence]. Although there were more restrictions on opinion evidence before the enactment of the Federal Rules, helpfulness to the trier of fact was seen then as an essential condition of admissibility.
>
> 3 *Weinstein's Evidence* ¶702[01] (1985).

Our judgment must therefore be guided by consideration of whether the testimony of the attorney expert aided the jury in its determination of critical issues in this case. We must also consider, however, whether the expert encroached upon the trial court's authority to instruct the jury on the applicable law, for it is axiomatic that the judge is the sole arbiter of the law and its applicability. As one scholar noted:

> A witness cannot be allowed to give an opinion on a question of law. . . . In order to justify having courts resolve disputes between litigants, it must be posited as an a priori assumption that there is one, but only one, legal answer for every cognizable dispute. There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge. . . . To allow anyone other than the judge to state the law would violate the basic concept. Reducing the proposition to a more practical level, it would be a waste of time if witnesses or counsel should duplicate the judge's statement of the law, and it would intolerably confound the jury to have it stated differently.

Stoebuck, *Opinions on Ultimate Facts: Status, Trends, and a Note of Caution*, 41 Den. L. Cent. J. 226, 237 (1964) (footnote omitted).

The concern that an expert should not be allowed to instruct the jury is also emphasized in Fed. R. Evid. 704, which allows witnesses to give their opinions on ultimate issues. In the adivsory notes to this rule, the committee stated:

> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty to formulate a rational scheme of distribution?" would be allowed.

The committee's illustration establishes the starting point for analysis of admissibility by distinguishing between testimony on issues of law and testimony on ultimate facts. While testimony on ultimate facts is authorized under Rule 704, the committee's comments emphasize that testimony on ultimate questions of law is not favored. The basis for this distinction is that testimony on the ultimate factual questions aids the jury in reaching a verdict; testimony which articulates and applies the relevant law, however, circumvents the jury's decision-making function by telling it how to decide the case.

Following the advisory committee's comments, a number of federal circuits have held that an expert witness may not give an opinion on ultimate issues of law. In *Marx & Co. v. Diners'*

Club, Inc., 550 F.2d 505 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977), for example, the Second Circuit held it was error for the trial court to allow a lawyer to render his opinions on the legal obligations arising from a contract and on the legal significance of various facts in evidence. The court stated, "legal opinions as to the meaning of the contract terms at issue . . . was testimony concerning matters outside [the witness's] area of expertise. . . . It is not for witnesses to instruct the jury as to the applicable principles of law, but for the judge." 550 F.2d at 509-10. Similarly, the Fourth Circuit decided the testimony of an attorney on the meaning and applicability of "domestic" (as opposed to foreign) law would be inadmissible as an invasion of the province of the judge. *See Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 366 (4th Cir. 1986). In *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983), the Fifth Circuit held that a witness's offering a legal conclusion on the contributory negligence of a party infringed upon the jury's role in deciding the case. Finally, in *United States v. Zipkin*, 729 F.2d 384 (6th Cir. 1984), the Sixth Circuit reversed the trial court's decision to allow a bankruptcy judge to testify regarding his interpretation of the Bankruptcy Act and his own orders. "It is the function of the trial judge to determine the law of the case," the court stated. "It is impermissible to delegate that function to a jury through the submission of testimony on controlling legal principles." 729 F.2d at 387.

The courts in these decisions draw a clear line between permissible testimony on issues of fact and testimony that articulates the ultimate principles of law governing the deliberations of the jury. These courts have decried the latter kind of testimony as directing a verdict, rather than assisting the jury's understanding and weighing of the evidence. In keeping with these decisions, we conclude the expert in this case was improperly allowed to instruct the jury on how it should decide the case. The expert's testimony painstakingly developed over an entire day the conclusion that defendants violated plaintiffs' constitutional rights. He told the jury that

warrantless searches are unlawful, that defendants committed a warrantless search on plaintiffs' property, and that the only applicable exception to the warrant requirement, search by consent, should not vindicate the defendants because no authorized person voluntarily consented to allow a search of the premises. He also stated that the acts of the private individual could be imputed to the accompanying police officer to constitute sufficient "state action" for a § 1983 claim. By permitting the jury to hear this array of legal conclusions touching upon nearly every element of the plaintiffs' burden of proof under § 1983, the trial court allowed the expert to supplant both the court's duty to set forth the law and the jury's ability to apply this law to the evidence.

Given the pervasive nature of this testimony, we cannot conclude its admission was harmless. There is a significant difference between an attorney who states his belief of what law should govern the case and any other expert witness. While other experts may aid a jury by rendering opinions on ultimate issues, our system reserves to the trial judge the role of adjudicating the law for the benefit of the jury. When an attorney is allowed to usurp that function, harm is manifest in at least two ways.

First, as articulated in *Marx & Co. v. Diners' Club, Inc.*, the jury may believe the attorney-witness, who is presented to them imbued with all the mystique inherent in the title "expert," is more knowledgeable than the judge in a given area of the law. *Marx*, 550 F.2d at 512. Indeed, in this case, the expert's knowledge and experience was made known to the jury by both the court and counsel in a manner which gave his testimony an aura of trustworthiness and reliability. Thus, there is a substantial danger the jury simply adopted the expert's conclusions rather than making its own decision. Notwithstanding any subsequent disclaimers by the witness that the court's instructions would govern, a practical and

experienced view of the trial would strongly suggest the jury's deliberation was unduly prejudiced by the expert's testimony.[4]

Second, testmimony on ultimate issues of law by the legal expert is inadmissible because it is detrimental to the trial process. If one side is allowed the right to call an attorney to define and apply the law, one can reasonably expect the other side to do the same. Given the proclivity of our brothers and sisters at the bar, it can be expected that both legal experts will differ over the principles applicable to the case. The potential is great that jurors will be confused by these differing opinions, and that confusion may be compounded by different instructions given by the court, *see United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986); *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 97 (2d Cir. 1983). We therefore conclude the expert's testimony on the ultimate issues of law was not harmless as contended by the dissent.

B

The line we draw here is narrow. We do not exclude all testimony regarding legal issues. We recognize that a witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible. Indeed, a witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms. For example, we have previously held that a court may permit an expert to testify that a certain weapon had to be registered with the Bureau of Alcohol, Tobacco, and Firearms. *United States v. Buchanan*, 787

[4] Indeed, one is constrained to ask why it is helpful to the jury to present expert testimony on the law if the witness himself states, as he did here, that anything he says is subject to correction by the judge. Is this not more confusing than helpful? The question is rhetorical and stands as further example why a lawyer's testimony on ultimate issues of law is improper.

F.2d 477, 483 (10th Cir. 1986). In that case, however, the witness did not invade the court's authority by discoursing broadly over the entire range of the applicable law. Rather, the expert's opinion focused on a specific question of fact.[5] *See also Huddleston v. Herman & MacLean,* 640 F.2d 534, 552 (5th Cir. 1981), *modified on other grounds,* 459 U.S. 375 (1983) (attorney expert in securities law allowed to testify that a statement in a prospectus was standard language for the issuance of a new security because this information helped the jury weigh the evidence of defendants' scienter); *United States v. Garber,* 607 F.2d 92 (5th Cir. 1979) (trial court erred in refusing to let experts on income tax law testify regarding whether failure to report funds received for sale of blood plasma constituted income tax evasion).

These cases demonstrate that an expert's testimony is proper under Rule 702 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function. However, when the purpose of testimony is to direct the jury's understanding of the legal standards upon which their verdict must be based, the testimony cannot be allowed. In no instance can a witness be permitted to define the law of the case.

Plaintiffs seek to avoid this conclusion by arguing the expert testimony here was no different from a medical expert testifying that specific conduct constitutes medical malpractice. We do not believe, however, there is an analog between the testimony of the medical expert and that of the legal expert because the former does not usurp the function of the court. The testimony of the medical expert in plaintiffs' hypothesis is more like that of the legal expert who explains a discrete point of law which is helpful to the jury's understanding of the facts.

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[5] By contrast, the expert in the instant case did not testify on issues of fact because he based his opinions on hypothetical facts. The expert added nothing to resolve the salient factual issues of the case.

The cross appeal in this case has been left unresolved owing to the panel's disposition. We therefore remand this matter to the original panel for further consideration.

85-1457, Specht v. Jensen, SEYMOUR, Circuit Judge, with whom McKay, Circuit Judge, joins, dissenting.

In testifying here, the expert, Daniel Sears, followed a format which is expressly contemplated by the Federal Rules of Evidence and is typical of expert testimony in general: Sears gave "a dissertation or exposition of . . . principles relevant to the case," and he took "the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts." Fed. R. Evid. 702 advisory committee's note. Although the majority opinion concludes that the admission of this testimony is reversible error, the opinion does not clearly articulate the ground upon which it holds the testimony inadmissible. The rationale upon which the majority then holds the error prejudicial is correspondingly murky, is without persuasive support, and is contrary to the weight of authority. In my view, when the expert testimony is considered in light of the record below and in the context of the rules governing the admissibility of such testimony, the error in its admission, if any, must be considered harmless. Accordingly, I respectfully dissent.

I.

STANDARD OF REVIEW

It is important to begin a review of the allegedly erroneous admission of this evidence by recognizing that "the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless *manifestly erroneous.*" *Salem v. U.S. Lines Co.*, 370 U.S. 31, 35 (1962) (emphasis added). "Moreover, error in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties, and the burden of demonstrating that substantial rights were affected rests with the party

asserting error." *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1155-56 (10th Cir. 1985).

> "The cases clearly indicate that the trial judge's ruling either excluding or admitting evidence will not be disturbed, except in rare instances. For example, in automobile accident cases, the trial judge has been affirmed regardless of whether he admitted or excluded the proffered expert testimony of an 'accidentologist.' For as the Fourth Circuit stated:
>
> > 'Whether, in any given case, the expert testimony is necessary to aid the jury in its search for the truth depends upon such a variety of factors readily apparent only to the trial judge that we must depend heavily upon his judgment.'
>
> "Numerous other cases indicate that trial courts may differ in their assessment of the helpfulness of particular kinds of expert testimony. Because of the Federal Rules emphasis on liberalizing expert testimony, doubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility unless there are strong factors such as time or surprise favoring exclusions. The jury is intelligent enough, aided by counsel, to ignore what is unhelpful in its deliberations."

3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶702[02], at 702-13 to -15 (1987) (footnotes omitted) (quoting *Krizak v. W.C. Brooks & Sons, Inc.*, 320 F.2d 37, 42 (4th Cir. 1963)).

II.

– PROVINCE OF THE COURT

In this case, the only reason offered by defendants at trial for excluding Sears' testimony was that, in giving his opinion on the issues of search and consent, Sears would articulate the law applicable to those issues and would thereby usurp the province of the court. I agree with the majority opinion to the

extent that it holds excludable expert testimony which merely sets out for the jury the applicable principles of law. Although the Federal Rules of Evidence generally permit an expert to state principles of "specialized knowledge" within his area of expertise, *see* Fed. R. Evid. 702 advisory committee's note, when a lawyer/expert does so he sets out legal principles. Because it is the law as articulated by the court that governs the jury's deliberations, the experts' evidence on the law may be excludable under Fed. R. Evid. 702 because it is not helpful to the jury.[1]

The admission of excludable evidence is not per se prejudicial error requiring reversal, however. The majority opinion here simply does not consider how, or even whether, Sears' articulation of his understanding of the law *in fact* prejudiced defendants. The two cases cited by the majority in which the admission of expert testimony on the law was held to be reversible error shed little light on the finding of such error here.

In *United States v. Zipkin*, 729 F.2d 384 (6th Cir. 1984), the court concluded that allowing a bankruptcy judge to testify on principles of bankruptcy law was prejudicial error. Central to

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[1] An interesting contrary view on presenting expert legal testimony to the trier of fact is found in Note, *Expert Legal Testimony*, 97 Harv. L. Rev. 797, 811-12 (1984) (footnotes omitted).

> "Expert testimony in harmony with the judge's view of the law may be completely appropriate. Allowing legal testimony before the jury only when the testimony is consistent with the judge's view of the law will eliminate the concern that such testimony may usurp the role of the judge or jury. As long as an expert does not present a legal conclusion that merely tells the jury what result to reach, expert legal testimony does not infringe upon the jury's function of applying the law to the facts of the case. Moreover, although there is a danger that such testimony will partially usurp the judge's role of instructing the jury on the law, such testimony may enhance rather than interfere with the judge's charge to the jury if the expert testifies consistently with the judge's view of the law."

the court's ruling was the fact that the expert's view of the law was erroneous, and the court's belief that a "jury listening to a bankruptcy judge testify as to a question of bankruptcy law would be expected to give special credence to such testimony." *Id.* at 387. The court noted the particular prejudice arising from the testimony of an expert who was "cloaked with the authority of his position as a bankruptcy judge." *Id.* at 387 n. 2. *Zipkin* is thus clearly distinguishable from the case before us.

In *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505 (2d Cir. 1977), an expert in securities law was permitted to give his opinion on the legal standards imposed by a contract to use best efforts to register stock. The court concluded that this testimony was objectionable because it did not concern practices in the securities business, on which the witness was qualified as an expert, "but were rather legal opinions as to the meaning of the contract terms at issue. It was testimony concerning matters outside his area of expertise." *Id.* at 509. The court held the admission to be prejudicial error because of the danger that "the jury may think that the 'expert' in the particular branch of the law knows more than the judge." *Id.* at 512. The majority relies on this conclusion, but neither the court in *Marx* nor the majority here describe how this potential danger created *actual prejudice,* and, in particular, do not consider whether the expert's view of the law conflicted with the law set out in the trial court's instructions.

Furthermore, the discussion in *Marx* indicates that the court failed to distinguish between testimony that arguably invades the province of the court by instructing on the law, and testimony that, by applying the law to the facts, can be described as invading the province of the jury. For example, the court states the following non sequitur: "It is for the jury to evaluate the facts in the light of the applicable rules of law, and it is therefore erroneous for a witness to state his opinion on the law of the forum." 550 F.2d at 510. The distinction between stating the law and applying it to the facts, a distinction not clearly made by either the court in *Marx* or the majority here,

is a subtle but critical factor in evaluating both admissibility under Fed. R. Evid. 704 and prejudice.

Significantly, in neither *Zipkin* nor *Marx* did the court indicate whether the jury was instructed to follow the law as given by the court and to give expert testimony only that weight, if any, the jury thought it deserved. In this case, to the contrary, the jury was in fact so instructed. *Zipkin* and *Marx* are simply not persuasive authority for concluding that reversible error occurred in the instant case.[2]

A review of the record here establishes that defendants cannot sustain their burden of demonstrating a prejudicial effect on their substantial rights arising from Sears' testimony on his view of the law. Defendants pointed out on cross-examination that Sears' opinions were based on his own view of the law, and that Sears did not know what the court's instructions on the law would be. Although Sears agreed that his view of the law in the area of search and seizure could very well differ from that of the trial judge, his definition of an illegal search was essentially the same as the one the judge gave to the jury[3]. *Cf. Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1459 (10th Cir. 1987). Significantly, Sears himself further stated that the trial court's "understanding of the law is controlling in this case."

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[2] The majority also cites *Adelman v. Baker, Watts & Co.*, 807 F.2d 359 (4th Cir. 1986), and *Owen v. Kerr-McGee Corp.*, 698 F.2d 236 (5th Cir. 1983). In those cases, however, the court affirmed the trial judge's decision to *exclude* an expert opinion. In view of the deference to be accorded a trial court's evidentiary rulings, they provide little help in determining whether the admission of such evidence constitutes reversible error.

[3] In their brief filed *after* rehearing was granted, defendants for the first time asserted that Sears misstated the law in two material respects. A careful examination of the record reveals that any discrepency between Sears' articulation of the law and the court's instructions is so de minimis as to be irrelevant, which perhaps explains why defendants did not raise this argument in a timely manner.

Rec., vol. III, at 133. The court instructed the jury that it must apply the law as stated in the court's instructions, and also informed the jury that it should determine what weight, if any, to give to the expert testimony.

Under these circumstances, I do not see how we can assume that, contrary to the court's instruction and Sears' own testimony, the jury turned to Sears rather than the judge for guidance on the applicable law. Moreover, even if the jury had done so, defendants still could not establish that they were thereby prejudiced, given the fact that Sears' legal definitions did not materially differ from those given by the court.[4] In analogous circumstances courts have concluded that any error in the admission of testimony on legal principles is harmless. *See, e.g., Karns,* 817 F.2d at 1459; *United States v. Gold,* 743 F.2d 800, 816-17 (11th Cir. 1984), *cert. denied,*469 U.S. 1217 (1985); *United States v. Fogg,* 652 F.2d 551, 556-57 (5th Cir. 1981), *cert. denied,* 456 U.S. 905 (1982); *cf. Weinstein's Evidence* ¶704[02] (jury confusion by or undue reliance on expert not a problem when court appropriately instructs jury and no conflict exists between expert testimony and court instruction).

Rather than addressing these specifics, the majority simply speculates that the jury will give more weight to the views of a legal expert than the instructions of the judge, without telling us how this could have been prejudicial here when the legal views expressed were the same. The majority then expresses concern that permitting a legal expert to define the law will evoke a similar response from the opposing party's legal

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[4] The majority's conclusion that Sears' testimony was not helpful to the jury is grounded on the conclusion that it was superfluous because it was cumulative to the court's instructions. However, the admission of evidence is not prejudicial error merely because that evidence is cumulative. *See Fortier v. Dona Anna Plaza Partners,* 747 F.2d 1324, 1332 (10th Cir. 1984).

expert, thereby confusing the jury even more. *See* maj. op. at 9-10. Of course, that did not happen in this trial, and has nothing to do with whether the error was harmless here. The majority's abstract assumptions of prejudice clearly do not meet the standards for assessing whether the admission of evidence is prejudicial. *See supra* at 2.

III.

PROVINCE OF THE JURY

Although they did not make this argument to the trial court,[5] defendants contend on appeal that the admission of Sears' testimony was also prejudicial error because it invaded the province of the jury. The majority opinion appears to agree, stating that the testimony was improper because it instructed "the jury on how it would decide the case," and allowed the expert to "supplant . . . the jury's ability to apply this law to the evidence." Maj. op. at 9. In so doing, the majority reveals a fundamental misconception of the grounds on which expert testimony is properly excludable.

An expert opinion which embraces an ultimate fact issue is *not* objectionable on the ground that it usurps the province of the jury by telling it how to decide the case. Indeed, the undisputed purpose of Rule 704 is to eliminate an objection to

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[5] Fed. R. Evid. 103(a)(1) provides

"(a) Effect of erroneous ruling

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection

In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . ."

expert testimony on this basis. *See* Fed. R. Evid. 704 advisory committee's note. In order to achieve this aim, Rule 704 specifically abolishes the "so-called 'ultimate issue'" rule. *Id.*

> "The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 *Wigmore* §§ 1920, 1921; *McCormick* § 12. The basis usually assigned for the rule, to prevent the witness from 'usurping the province of the jury,' is aptly characterized as 'empty rhetoric.' 7 *Wigmore* § 1920, p. 17.

Although courts have discretion to exclude expert testimony on other grounds, *see* 3 *Weinstein's Evidence* ¶704[02], at 704-11, it is significant that the trial court here did not do so. Thus, our focus must be on whether this failure to exclude on other grounds was an abuse of discretion. The law and the record simply do not support such a conclusion.

Rule 702 allows expert opinion testimony that "will assist the trier of fact to understand the evidence or to determine a fact in issue." Accordingly, some courts have held that "Rule 702 makes inadmissible expert testimony as to a matter which obviously is within the common knowledge of jurors because such testimony, almost by definition, can be of no assistance." *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1055 (4th Cir. 1986); *see also Zimmer v. Miller Trucking Co.*, 743 F.2d 601, 604 (8th Cir. 1984); *United States v. Brown*, 501 F.2d 146, 149-50 (9th Cir. 1974). However, a leading commentator argues that a trial court is not required to exclude expert testimony if the subject is within the comprehension of the average juror, because any blanket rule requiring exclusion in such situations

> "is incompatible with the standard of helpfulness expressed in Rule 702. First, it assumes wrongly that there is a bright line separating issues within the comprehension of jurors from those that are not. Secondly, even when jurors are well equipped to make judgments on the basis of their common knowledge and experience, experts may have specialized knowledge to bring to bear on the same issue which would be helpful."

3 *Weinstein's Evidence* ¶702[2], at 702-9 to -10. Moreover, those cases holding expert testimony excludable on this ground have observed that "the admission of such testimony, though technical error, will almost invariably be harmless." *Scott*, 789 F.2d at 1055; *Brown*, 501 F.2d at 150.

In the instant case, defendants have not argued that the expert's opinion was inadmissible because the issues to be decided were ones on which the jury did not need the help of an expert. To the contrary, at trial defendants characterized the issues as "of quite substantial complexity, not only as to the law but in terms of the particular facts as determined in this case." Rec., vol. III, at 63.

When an ultimate fact issue is one on which expert testimony would be helpful to the jury, an expert opinion may nonetheless be excludable if it does not convey information which is in a form useful to the jury.

> "Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria."

Rule 704 advisory committee's note. Such expert opinions are excludable not because they tell the jury how to decide the case, but because they do not provide the jury with

information the jury needs to make an independent assessment of the ultimate issue. Thus, an opinion couched in inadequately explored legal criteria is not helpful because it uses terminology the meaning of which is not reasonably clear to laymen. *See United States v. Hearst,* 563 F.2d 1331, 1351 (9th Cir. 1977); *see also* 3 *Weinstein's Evidence* ¶704[01]. For example, telling a jury that a testator did not have the capacity to make a will is not helpful to a jury when the jury is not told what elements comprise the capacity to make a will. The legal term "capacity" by itself provides no assistance to jurors, unversed in the jargon of probate law. The record in the instant case reveals that the legal criteria used by Sears were adequately defined for the jury and defendants do not argue to the contrary. His opinion testimony was therefore not objectionable on that ground.

Occasionally, expert opinions framed in terms of inadequate legal criteria have been confusingly condemned as expressing legal conclusions. "A court which does not ban opinion on the ultimate issue as such may nevertheless condemn a question phrased in terms of a legal criterion not adequately defined by the questioner so as to be correctly understood by laymen, the question being interpreted by the court as calling for a legal conclusion." *McCormick on Evidence* § 12, at 32. Labeling evidence as a legal conclusion and holding it excludable on that ground obscures the real reason for its inadmissibility—lack of helpfulness—and frustrates a proper inquiry into that issue. When an expert gives an opinion that applies the principles of his expertise to the facts in evidence, thereby testifying to his view of the ultimate issue, his opinion will often be in the form of a "legal conclusion", i.e., a conclusion as to the legal result in the case. When jurors understand the legal criteria upon which the opinion is founded, such a "legal conclusion" may nonetheless be helpful to them. Thus, a standard that focuses on a label rather than on the value of the evidence to the jury may well exclude helpful evidence that is properly admissible, a result contrary to Rules 702 and 704. *See Moore's Federal Practice* §

704.10; *cf. McCormick on Evidence* § 12, at 32 & n. 24. In addition, denominating testimony as a "legal conclusion" opens the door to confusing an opinion arguably usurping the province of the court with an opinion applying the law to the facts. Failure to carefully identify the ground on which evidence is objectionable renders impossible the required assessment of whether its admission actually caused the prejudice that its inadmissibility was designed to prevent.

The majority opinion in this case makes these very mistakes. Although the opinion pays lip service to the Federal Rules of Evidence by recognizing that expert opinions on the ultimate issue are admissible if helpful to the factfinder, it condemns the expert testimony here as embodying inadmissible legal conclusions, a characterization that does not explain why the testimony is not helpful or is otherwise inadmissible.[6] Labeling testimony as a legal conclusion in and of itself provides no meaningful guidance on either its admissibility or any resulting prejudice.

Finally, I must address the majority's concern that the evidence circumvented "the jury's decision-making function by telling it how to decide the case." Maj. op. at 7. The majority finds error because "the expert in this case was improperly allowed to instruct the jury on how it should decide the case", thereby supplanting "the jury's ability to apply this law to the evidence." *Id.* at 9. In so doing, the majority fails to recognize both that any expert who gives an opinion on the ultimate issue is in effect telling the jury how to decide the case, and that such testimony is specifically permitted by Rule 704. *See, e.g., Nielson v. Armstrong Rubber Co.*, 570 F.2d 272, 276-77 (8th Cir. 1978) (expert testimony that manufacturing process caused product defect admissible

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[6] In rejecting the expert testimony here as inadmissible legal opinion, the majority opinion appears to hold that it usurped the province of the court, and was not helpful to the jury, and told the jury how to decide the case.

under Rule 704). The *only* exception to allowing an expert opinion on the ultimate issue of fact is set out in Rule 704(b), which provides:

> "(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone."

We are not at liberty to create another exception for legal expert testimony when the Rules do not do so. Moreover, as the majority acknowledges, this court and other circuits allow an opinion by a legal expert in which the expert applies the principles of his expertise, the law, to the facts in evidence. *See, e.g., United States v. Buchanan,* 787 F.2d 477, 483 (10th Cir. 1986); *see also Gold,* 743 F.2d at 816-17; *United States v. Bednar,* 728 F.2d 1043, 1048 (8th Cir. 1984); *Fogg,* 652 F.2d at 556.

The majority's statement that Sears' testimony was excludable because it supplanted the jury's ability to apply the law to the evidence may be meant as a holding that this testimony created the danger that the jury would rely on the expert rather than make an independent determination of the ultimate issues. However, the jury in this case was instructed that it should determine what weight, if any, to give the expert testimony, as with the testimony of any other witness. The jury was further instructed that it was the judge of the facts, that it was to follow the law as stated in the court's instructions, and that it was to apply this law to the facts as the jury found them. Courts and commentators have overwhelmingly concluded that such instructions preclude a finding of prejudice because they eliminate any possibility that expert testimony on the ultimate fact could overbear the jury's independence. *see, e.g., Karns,* 817 F.2d at 1459; *Gold,* 743 F.2d at 817; *Davis v. Combustion Engineering, Inc.,* 742 F.2d 916, 919 (6th Cir.

1984); *Fogg*, 652 F.2d at 557; *United States v. Scavo*, 593 F.2d 837, 844 (8th Cir. 1979); 3 *Weinstein's Evidence* ¶*04[02]*, at 704-15 to -16; *cf.* 11 *Moore's Federal Practice* § 704.10, at VII-66 (helpful expert testimony on ultimate issues does not invade jury's province "since it is trier of fact who ultimately determines what weight to give the opinion testimony of the witness"); *McCormick on Evidence* § 12, at 31 (notion that opinions on ultimate facts usurp function of jury is illogical).

Although the majority states that its holding is a narrow one, and that expert legal testimony is still admissible, the opinion provides no meaningful standard by which to distinguish proper testimony from that giving rise to reversible error. It is therefore difficult to see how any prudent trial judge will risk reversal by admitting such testimony after today's ruling. If the expert is allowed to give his opinion without articulating the underlying legal principles, the opinion is objectionable as based on inadequately explored legal criteria. *See* Rule 704 advisory committee's note. If the expert does define the legal principles upon which his opinion is based, under the majority opinion he usurps the province of the court, or the jury, or both. Moreover, although in virtually every other context this court presumes that a jury will follow the court's instructions, under today's decision even the most explicitly limiting jury instructions will not prevent a finding of prejudice.

IV.

CONCLUSION

In sum, even assuming the majority could reasonably conclude the trial judge abused her discretion in admitting the evidence, the admission simply did not give rise to prejudicial error. In reversing, the majority disregards the deference with which we view trial court evidentiary rulings, fails to provide meaningful guidance on either admissibility or prejudice, and reintroduces "quibbles over the meaning of ultimate fact, and

the distinction between fact and law" which the Federal Rules of Evidence were meant to eliminate. 3 *Weinstein's Evidence* ¶704[02], at 704-17. Accordingly, I dissent.

APPENDIX C

The entire testimony of Mr. Sears on direct examination is set forth as follows:

Q: Now, taking all of those assumptions, I would ask you if you have formed an opinion as to whether a search of that building occurred?

A. My first response: Based upon the activity of the individuals who entered the building and proceeded through the joint area and proceeded into the private area of Mr. Specht—based upon those facts, yes, I would conclude that a search was conducted.

What I would need to know—you have indicated in your proffer of facts that there was no valid search warrant. If there was no valid search warrant, then the question that has to be asked is whether there was any valid authority to enter the premises.

It is normally recognized that warrantless entry into any premises is per se unreasonable and constitutes an unlawful search. So the next consideration that would have to be addressed is whether there was a consensual search; and if the people whom you have indicated were approached with regard to gaining access to the premises did not have the authority to consent to a search, then the entire episode, the entry into the premises, the subsequent search and inspection of the premises, would constitute an unlawful search.

Q. And is that true of both the common area, the reception area, and of Mr. Specht's office?

A. You have had to look at the original authority by which entry is gained onto the premises. If there is no consensual—if there is no free and voluntary consent by an authorized person to give access to the premises, then it would include all portions inside the building, both common areas as well as the private areas of any individual whose premises are searched.

Q. Mr. Sears, taking all of the previous assumptions except for the last one and substituting that one for this: Assuming that the son of the building owner who asked to see the search warrant testified that the presence of the police officer and the document had a great effect on his decision to let them in the building, would that change your decision as to these searches being nonconsensual?

A. No, it would reinforce my decision—or at least reinforce my opinion.

Q. Taking all of those events and assumptions as true and if true, did a search occur of the Specht' residence?

A. Yes, I would conclude a search did take place.

Q. Do you have an opinion as to whether it was a consensual search?

A. Well, I would have to analyze that on a step-by-step process.

Q. Please.

A.. And please correct me if my sequence of the events is not correct.

It is my understanding that Officer Owens approached the door and asked for George. Is that correct?

Q. Mr. Specht. That's correct.

A. Mr. Specht. All right. And was subsequently invited into the premises—

I'll proceed to respond on the basis of my understanding of the sequence of events as you outlined them.

First of all, as I indicated in my initial response with regard to the search of the business premises, it must start from the basic premise that any warrantless search is per se unreasonable. From that point forward, again, there are various exceptions to that doctrine which may make a search lawful.

As applied to these facts, it would be my understanding that a search could be conducted only on several bases: First of all, if there was probable cause to believe that the property that was being sought is on the premises and if there is exigent circumstances to believe that either the property is going to be removed or evidence is going to be destroyed, then an entry could take place on that basis. The only other basis that I'm aware of would be on a consensual basis; and a consensual search must be premised on a free and knowing waiver of the right to refuse to consent to a search. And if that is preceded by any colorable claim of authority, such as process which is not tantamount to a valid search warrant, any subsequent search, which I've already indicated took place, would be unlawful.

Q. Do I understand, then, your opinion to be that there was not a consensual search?

A. That is correct, based upon the submission of the process apparently to Mrs. Specht, on the basis of your indication it was not a valid search warrant, on the basis of the announcement that there was an intention to search for property. On those bases, I would submit that there was no free and knowing consent entered on the basis of the facts that have been presented.

Q. Taking the assumptions that I gave you in the hypothetical as to the house and taking my representations in those assumptions as to the placement of the parties and the movement of the parties, did you form an opinion as to who, if any one of those five individuals, conducted a search?

Q. Did you form such an opinion, first?

A. Yes.

Q. And what is that opinion as to the residence?

A. I'm sorry. I believe you're going to have to rephrase or restate the question, Mr. Bosworth.

Q. Based upon the hypothetical and the movement of the parties as I related to you, did you form an opinion as to who conducted a search?

A. Yes.

It would be my opinion that all persons that entered the premises conducted a search.

Q. And what is that opinion based upon?

A. It would be based upon the sequence of facts that you outlined to me. First of all, the initial invitation, if it may be called that, of Officer Owens to enter the premises was not tantamount to a consensual search. If there was not a further invitation extended to the other individuals, certainly their rush into the premises would be an unlawful intrusion. Any sightings or observations that took place, any wanderings through the premises, would be tantamount to an unlawful search.